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No. 91-240

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT EUGENE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly given separate sentences for six separate violations of 26 U.S.C. 5861(d).



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OPINION BELOW

The opinion of the court of appeals (Pet. App. 4a-6a) is reported at 926 F.2d 763.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1991. A petition for rehearing was denied on May 8, 1991. Pet. App. 7a. The petition for a writ of certiorari was filed on August 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of conspiracy to possess unregistered firearms, in violation of 18 U.S.C. 371 (Count 1);

possession of unregistered firearms, in violation of 26 U.S.C. 5861(d) (Counts 2-7); and interstate transportation of a firearm by a fugitive, in violation of 18 U.S.C. 922(g)(2) (Count 8). He was sentenced to a total of 20 years' imprisonment. Thereafter, petitioner filed a motion to correct his sentence under 28 U.S.C. 2255. The district court denied the motion. The court of appeals affirmed. Pet. App. 4a-6a.

Petitioner was convicted of possessing two machine guns (Counts 2 and 3), a sawed-off shotgun (Count 4), hand grenades (Count 5), a pipe bomb (Count 6), and a silencer (Count 7), that were not registered to him, in violation of 26 U.S.C. 5861(d). The sentencing court imposed a ten-year sentence for each violation of Section 5861(d); the sentences on Counts 2, 3, and 4 were made concurrent with each other and consecutive to the sentences on Counts 5, 6, and 7, for a total of 20 years' imprisonment. Pet. App. 5a; Gov't. C.A. Br. 2-3.

Petitioner did not appeal from the judgment against him. Two years later, however, he filed a motion to correct his sentence under 28 U.S.C. 2255. In that motion, he alleged that the court lacked jurisdiction over him because he was maintaining a lawful "unorganized militia." He also argued that it was unlawful for the court to impose more than a total of ten years' imprisonment for the multiple violations of Section 5861(d), because he had possessed the firearms during a single course of conduct. The district court denied the motion. The court noted that petitioner's possession of each unregistered firearm was a separate offense that could be separately charged and punished. The total of 20 years' imprisonment on the six counts was therefore well below the permissible statutory maximum. Pet. App. 1a-3a.

The court of appeals affirmed. The court held that since Section 5861 bars the possession of "a firearm" that is unregistered, each possession of an unregistered firearm is a separate violation of the statute. The district court therefore acted lawfully, the court held, when it in effect imposed two consecutive sentences for the possession of six unregistered firearms. Pet. App. 4a-6a.¹

ARGUMENT

Petitioner contends (Pet. 5-10) that the sentencing court erred in imposing two consecutive ten-year maximum terms of imprisonment for his six violations of 26 U.S.C. 5861.²

Petitioner was convicted of six separate violations of 26 U.S.C. 5861(d), which provides that it is unlawful for a person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." Section 5871 of Title 26 provides, in turn, that "[a]ny person who violates * * * any provision of [Section 5861]" shall be fined not more than \$10,000 or be

¹ On appeal, petitioner abandoned his argument that he was maintaining a lawful "unorganized militia." Pet. App. 5a n.2.

² As an initial matter, petitioner's claim was not properly before the court of appeals. A defendant who has not raised a challenge to his conviction or sentence on direct appeal may not thereafter raise the issue under 28 U.S.C. 2255 unless he can show both "cause" and "prejudice" for the default. See *Murray v. Carrier*, 477 U.S. 478 (1986); *Smith v. Murray*, 477 U.S. 527 (1986). Petitioner did not take a direct appeal from his conviction, and he has not shown cause for his default. The question presented is not novel, and petitioner has not shown that he was prevented from raising the issue on direct appeal. Accordingly, although the government did not raise the point in the court of appeals, petitioner was not entitled to pursue this issue under Section 2255.

imprisoned not more than ten years, or both. Section 5861(d) prohibits the possession of "a firearm which is not registered to him." 26 U.S.C. 5861(d) (emphasis added). Congress's use of the phrase "a firearm" implies that each firearm is subject to a separate conviction and punishment. That construction is buttressed by the purpose of the statute. Section 5861 is part of a comprehensive transfer tax statute. See 26 U.S.C. 5801-5872. A separate tax is imposed on each firearm transferred. 26 U.S.C. 5811(a). Thus, limiting the government to a single conviction and punishment for possession of multiple unregistered firearms would frustrate the government's ability to collect the tax on each weapon. Every court of appeals that has considered the issue has agreed with this analysis and has concluded that a defendant may be separately convicted for each possession of an unregistered firearm, and that cumulative punishment is authorized for multiple Section 5861(d) convictions. See *United States v. Nichols*, 731 F.2d 545, 546 (8th Cir.), cert. denied, 469 U.S. 1085 (1984); *United States v. Alverson*, 666 F.2d 341, 346-347 (9th Cir. 1982); *United States v. Tarrant*, 460 F.2d 701, 704 (5th Cir. 1972); *Sanders v. United States*, 441 F.2d 412, 414-416 (10th Cir.), cert. denied, 404 U.S. 846 (1971). Since petitioner possessed six separate unregistered firearms, he was properly convicted of six separate violations of Section 5861(d) and sentenced to two consecutive ten-year sentences.

Petitioner's contention (Pet. 6-7) that he engaged in a single course of conduct that supported but a single sentence under Section 5871 is meritless. A defendant convicted of multiple violations of Section 5861 based upon the possession or use of a single firearm is subject to only a single punishment because conduct involving a single firearm constitutes but a

single course of conduct. See *United States v. Nichols*, *supra*; see also *United States v. Clements*, 471 F.2d 1253 (9th Cir. 1972). The single course of conduct principle does not apply here because petitioner's sentences were based on his possession of six firearms, not a single firearm.

Petitioner also argues that only a single punishment should be imposed for possession of multiple firearms, because the felon-in-possession statute, 18 U.S.C. 922(g), has been construed to bar cumulative punishment for possession of multiple firearms at the same time and place.³ See, *e.g.*, *United States v. Grinkiewicz*, 873 F.2d 253, 255 (11th Cir. 1989). Petitioner fails to recognize that the language and the legislative purpose of Section 5861(d) differ from the language and purpose of Section 922(g). First, the term "any firearm" in Section 922(g) is ambiguous as to whether each possession of a separate firearm constitutes a separate offense. In contrast, Section 5861(d)'s prohibition against possession of "a firearm" carries no such ambiguity. In addition, Section 5861's purpose of ensuring that the government collects a tax for each firearm transferred has no counterpart in Section 922(g). For those reasons, the courts of appeals have uniformly rejected the argument that the unit of prosecution under Section 5861(d) is the same as that under Section 922(g). See *United States v. Kinsley*, 518 F.2d 665, 670 (8th Cir. 1975); *United States v. Tarrant*, *supra*; *Sanders v. United States*, *supra*.

Relying on *Bell v. United States*, 349 U.S. 81 (1955), petitioner contends that the rule of lenity

³ Section 922(g) states, in relevant part, that it shall be unlawful for convicted felons and other specified persons "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition."

requires that only a single sentence be imposed for his multiple Section 5861 convictions. In *Bell*, the defendant was separately convicted and punished under the Mann Act, 18 U.S.C. 2421 (1982), for transporting in a single trip two women for the purpose of prostitution. The Court reversed, holding that the defendant was subject to only a single conviction and punishment. It reasoned that Section 2421, which barred the interstate transportation of "any woman" for the purpose of prostitution was ambiguous concerning the allowable unit of prosecution. Accordingly, the rule of lenity required that the ambiguity be resolved in the defendant's favor.

The rule of lenity applies only after a statute has been determined to be ambiguous. *Moskal v. United States*, 111 S. Ct. 461, 465 (1990). Here, the language and purpose of Section 5861(d) unambiguously demonstrate that Congress intended to allow the government to prosecute and punish each possession of an unregistered firearm as a separate offense. For that reason, the rule of lenity has no role to play in this setting.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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